U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUL 17 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M. McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (director). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider.[1] The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a computer service company.[2] It seeks to employ the beneficiary permanently in the United States as a SAP Manager.[3] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and the beneficiary did not satisfy the minimum level of experience stated on the Form ETA 750. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

At issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, whether or not the beneficiary has the required experience and whether a *bona fide* job opportunity exists.

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[1] On May 22, 2013, the AAO sent the petitioner a notice of intent to dismiss and notice of derogatory information (NOID/NDI), informing the petitioner that according to the Nebraska Secretary of State, the petitioner was shown in inactive status. In response, the petitioner submitted proof of its reinstatement with the State of Nebraska. The Certificate of Revival or Renewal reflects that the petitioner was automatically dissolved on April 16, 2012 as a result of non-payment of occupational taxes and was reinstated on June 3, 2013, after curing this defect. According to Nebraska Revised Statutes § 21-323.01 reinstatement is retroactive to the date of automatic dissolution.

[2] The petitioner acquired the predecessor company, [redacted] in 2005. Although the Asset Purchase Agreement is dated December 12, 2005, the closing date in Article VII of the Agreement is described as October 31, 2005. In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981). Here, the petitioner has established a valid successor relationship for immigration purposes.

[3] The record shows that the beneficiary was the manager of [redacted] He is presently the president of [redacted] a subsidiary of the petitioner, and serves as the president of the petitioner.

Section 203(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2) states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on January 15, 2004.[4] The proffered wage as stated on the Form ETA 750 is $120,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in MIS, CS, or related and five years of experience in the job offered or the related occupation of software engineer.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[5]

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[4] The original Form ETA 750 was filed by the predecessor company,

[5] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claims to have been established in 2005, to have a gross annual income of $447,700, and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 5, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner has submitted the following Internal Revenue Service (IRS) Forms W-2 for the beneficiary showing compensation received from the petitioner as detailed in the table below.

Year	Wages Paid	Difference between the proffered wage and wages paid
2004	$120,000	$0
2005	$67,000[6]	$53,000
2006	$75,000	$45,000

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newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[6] The beneficiary was employed by the predecessor company, [redacted] for part of 2005 and according to a Form W-2 in the record, was paid $31,000. The beneficiary was also employed by the petitioner in 2005 and according to a Form W-2 in the record, was paid $36,000. The 2005 income tax return submitted by the petitioner states that in that year it paid $0 in wages and salaries and had no costs of labor. Had the beneficiary been paid $36,000 in that year by the petitioner, this should have been reflected on the petitioner's tax returns. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

2007	$90,000	$30,000

Here, the predecessor paid the beneficiary the full proffered wage in 2004. The petitioner established that it paid the beneficiary less that the full proffered wage from 2005 through 2007. Therefore, the petitioner must establish that it, or its predecessor, can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2005 and that it can pay the difference between the proffered wage and actual wages paid to the beneficiary in 2006 and 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 25, 2008 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date, the petitioner's 2007 federal income tax return was the most recent return available. The petitioner's tax returns show their net income as detailed in the table below.

Year	Net Income
2005	$0[7]
2006	$0
2007	-$80,937

The petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage for any of the relevant years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the

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[7] As noted above, the Asset Purchase Agreement dated December 12, 2005 describes the date of transfer of the enterprise from the , to the petitioner as October 31, 2005. Although the apparently issued a Form W-2 to the beneficiary representing $31,000 in wages paid by that limited liability company in that year, counsel claims that the did not file a tax return in that year. It is noted that the 2004 tax return is ticked "final return." The must establish its ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2005. The did not submit a tax return or audited financial statement for 2005 establishing this ability. Accordingly, for this reason alone, the appeal must be dismissed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). It is further noted that the director specifically requested evidence of both the predecessor's and the petitioner's ability to pay the proffered wage pivoting on the date of conveyance. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 to 2007, as shown in the table below.

Year	Net Current Assets
2005	$0
2006	$342,018
2007	$772,136

The petitioner had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2006 and 2007, but not 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel asserts that the AAO should consider management fees from a subsidiary company, that the petitioner states were paid to the predecessor and petitioner in 2005. In support of this assertion counsel provided copies of 2005 tax return showing that the company paid management fees; however, the tax return does not serve as evidence that the petitioner or predecessor received these payments. This type of income would be reported on the petitioner or predecessor's tax returns and considered in our ability to pay analysis. However, as noted above, the petitioner has failed to submit a copy of the predecessor's 2005 tax return and the petitioner's 2005 tax return shows receipts and income of $0. Counsel also asserts that any unpaid management fees owed to the petitioner are an account receivable. Here again, if an account receivable existed, it should be reflected on the petitioner's tax returns and would have already been considered in our analysis of the petitioner's net current assets.

On motion, counsel further asserts that under a totality of circumstances analysis, the petitioner has shown its ability to pay the beneficiary the proffered wage. The AAO disagrees. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and

[8]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not provided the regulatory prescribed evidence for 2005 for the predecessor company and has not addressed the inconsistencies noted in the AAO's prior decision concerning the petitioner's 2005 tax returns. Absent this information, the AAO cannot make a positive determination on the petitioner's ability to pay. Furthermore, the evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage in 2005. In addition, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 2005. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

To be eligible for approval, a beneficiary must also have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: Bachelor's degree in MIS, CS, or related

Experience: 5 years in the job offered or the related occupation of Software Engineer

Block 15: None.

On the Form ETA 750B, signed by the beneficiary, the beneficiary states that he has over nine years of employment experience in the profession obtained before the priority date of January 15, 2004, the date in which the predecessor company filed the alien employment certification with the DOL. 8 C.F.R. § 204.5(d).

In the instant case, the director determined that the record does not show that the beneficiary possessed the required five years of experience in the job offered or the related occupation of Software Engineer. The regulations require that evidence relating to qualifying experience be in the form of letters from the employers which include the name, address, and title of the author and a specific description of the duties performed. *See* 8 C.F.R. § 204.5(g)(1). The record contains the following employment experience letters:

- Letter from the Director of RIBS Integrations stating that the beneficiary was employed as an ABAP/4 faculty and SAP R/3 consultant from August 1998 to December 14, 1998. This experience was not listed on the ETA 750B and contradicts the information on the ETA 750B, which states that the beneficiary was employed by from September 1994 to February 1999. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*
- Letter from Manager-Accounting of stating that the beneficiary was employed as a Project Manager from January 1, 2002 to the date of the letter, July 23, 2002. This letter does not describe the beneficiary's duties and therefore does not meet the requirements of the regulation at 8 C.F.R. § 204.5(g)(1).

The record also contains numerous job offer letters and support letters written as part of H-1B petitions for non-immigrant status filed on behalf of the beneficiary by other companies; however, these letters speak to the intent to prospectively employ the beneficiary. These letters do not constitute evidence of the beneficiary's past employment. Therefore, the petitioner has not established that the beneficiary has the required five years of experience.

On motion, counsel asserts that an affidavit from the beneficiary is sufficient evidence of the beneficiary's experience when taken in conjunction with the various offer letters and support letter that were previously submitted. As noted in the AAO's prior decision, the beneficiary's affidavit is

self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The regulations require that evidence relating to qualifying experience be in the form of letters from the employers which include the name, address, and title of the author and a specific description of the duties performed. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The letters submitted by the beneficiary do not meet the requirements of the regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the petitioner has not established that the beneficiary has the required experience to satisfy the terms of the labor certification and for classification as an advanced degree professional.

The record also does not establish that a *bona fide* job offer exists. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for a position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In this matter, it appears that the beneficiary is an owner and officer of both the predecessor and the petitioner. The beneficiary signed the predecessor's 2004 tax return as the entity's "general partner" or "member manager" and signed the Agreement of Sale to the petitioner as "president." It appears that the petition and the labor certification were filed as vehicles to self-employment and do not represent a *bona fide* job offer open and available to qualified U.S. workers.

On appeal, counsel asserted that the beneficiary and the petitioner are distinct legal entities and as such a *bona fide* job offer exists. Counsel is mistaken about the requirements of a *bona fide* job offer in these proceedings. The degree of the beneficiary's ownership and control of the predecessor and petitioner indicates that the petition and the labor certification were filed as vehicles to self-employment and do not represent a *bona fide* job offer that was open and available to qualified U.S. workers. On motion, counsel does not disagree with this statement, but rather continues to assert that because the beneficiary is not inseparable from the company, a *bona fide* job offer exists. Counsel cites to *Modular Container Systems, Inc.* 89-INA-228 (BALCA July 16, 1991) (en banc). *Modular Container Systems* applies a totality of circumstances test to ascertain a *bona fide* job offer with respect to the alien's inappropriate control over a job offer, delineating nine criteria that would indicate that the alien exercised undue influence over the job opportunity. In the instant case, the beneficiary must answer "yes" to seven of the nine criteria, making it clear that the beneficiary had inappropriate control over the job opportunity and that a *bona fide* job offer did not exist.

Counsel also submits a letter from who was formerly on the petitioner's board of directors. We note that in the letter, emphasizes the importance of the beneficiary's role in the company as one of only two individuals currently on the board of directors. The letter further states that the beneficiary is the Director of Development, not an SAP manager, as indicated on the ETA 750 and Form I-140 petition. Given the beneficiary's position and ownership of the company, it is doubtful that the beneficiary intends to fill the position of SAP manager, a position that does not exist, according to the list of staff. Therefore, we affirm the prior determination that a *bona fide* job offer open to qualified U.S. workers does not exist. The appeal must also be dismissed for this reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motions are granted and the decision of the AAO dated August 30, 2011 is affirmed. The petition is denied.